

***United States Court of Appeals
for the Second Circuit***



**INTERVENOR'S
BRIEF**

ORIGINAL

77-4085

United States Court of Appeals
FOR THE SECOND CIRCUIT

NATIONAL LABOR RELATIONS BOARD,
Petitioner,
v.

NASSAU COUNTY HEALTH FACILITIES ASSOCIATION, INC. AND
ITS MEMBERS, ST. JAMES NURSING HOME, ST. JAMES
PLAZA, HUNTINGTON NURSING HOME, HUDSON VIEW
MANOR, HUDSON VIEW NURSING HOME AND CARRILLON
HOUSE AND H. R. F.,

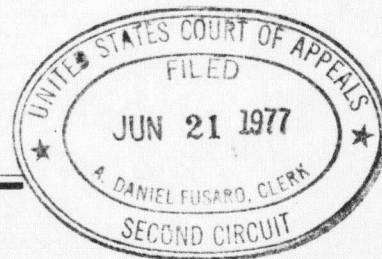
Respondents.

ON APPLICATION FOR ENFORCEMENT OF AN ORDER
OF THE NATIONAL LABOR RELATIONS BOARD

BRIEF FOR INTERVENOR LOCAL 1115 JOINT BOARD,
NURSING HOME AND HOSPITAL EMPLOYEES
DIVISION IN SUPPORT OF ENFORCEMENT
OF THE BOARD'S ORDER

CHARLES R. KATZ, Esq.
Attorney for Intervenor
360 Lexington Avenue
New York, New York 10017
Tel. No. (212) 867-9140

RICHARD M. GREENSPAN, Esq.
On the Brief



INDEX

	<u>Page</u>
TABLE OF CASES	ii
STATEMENT OF FACTS	1
POINT I	
THE RESPONDENTS HAVE VIOLATED SECTIONS 8(a)(5) AND (1) OF THE ACT.	3
POINT II	
THE APPROPRIATE REMEDY	6
CONCLUSION	8

TABLE OF CASES

Page

STATUTES

Labor-Management Relations Act, As Amended, ("Act"), 29 U.S.C. 151, et seq.	2
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CASES

C & S Industries, Inc., 154 NLRB 454,	6
Huttig Sash & Door Co., Inc., 377 F.2d 964 (8 Cir. 1967)	6
Isis Plumbing & Heating Co., 138 NLRB 716	7
Leeds & Northrup Co. v. NLRB, 391 F.2d 894 (3 Cir. 1968) enforcing 162 NLRB No. 87	7
George E. Light Boat Storage Inc., 373 F.2d 762 (5 Cir. 1967), enforcing 153 NLRB 1209 (Fn. 1 on this issue)	7
NLRB v. Frontier Homes Corp., 371 F.2d 964 (8 Cir. 1967), enforcing in part 153 NLRB 1070	7
NLRB v. Mine Workers Local 403, 375 U.S. 396 (1964)	7
NLRB v. Seven-Up Bottling Co., 344 U.S. 344 (1953)	7
Nedco Construction Corp., 200 NLRB 150	6
Oak Cliff-Golman Baking Co., 202 NLRB 614, 207 NLRB 1063, enforcing Sub Nom NLRB v. Oak Cliff-Golman Baking Co., 505 F.2d 1302 (5 Cir. 1974)	4
Overnite Transportation Co. v. NLRB, 372 F.2d 765 (4 Cir. 1967), cert. denied 389 U.S. 838, enforcing 157 NLRB No. 103.	7
Republic Aviation Corp. v. NLRB, 324 U.S. 793 (1945)	7
Russell Motors, Inc. v. NLRB, 481 F.2d 996 (2 Cir. 1973)	7
Universal Camera v. NLRB, 340 U.S. 474 (1951)	6
Washington Employers' Inc., 200 NLRB 825, 827	5
Washington Refrigeration Service Co., 206 NLRB 852	6

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HOME, ST. JAMES PLAZA, HUNTINGTON NURSING
HOME, HUDSON VIEW MANOR, HUDSON VIEW NURSING
HOME AND CARRILLON HOUSE AND H. R. F.,

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BRIEF FOR
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OF THE BOARD'S ORDER.

Statement of Facts

Local 1115 Joint Board, Nursing Home and Hospital Employees Division (herein "Local 1115"), the Charging Party in the above captioned consolidated case and Intervenor herein, submits this Brief in support of enforcement of the Board's Order.

The facts presented in this case are not in dispute. Local 1115 represents various bargaining units in the facilities involved. In December 1974 a collective bargaining agreement with the Nassau County Health Facilities Association was negotiated and executed effective for four years from January 1, 1975. This Agreement became the basic agreement for those employers who were not members of the Association and who are respondents in this proceeding. The "independents" had separate negotiations with Local 1115 and some changes were negotiated in the basic contracts. The contracts provided for,

among other things, certain increases in wages, holidays and sick leave. Increases were due in 1975 and were paid. In December of 1975 the Union received from the various employers notice that the employers would not grant the wage increases or additional benefits which were due on January 1, 1976. The employers urged that because of a Medicaid reimbursement freeze, they were unable to pay.

Local 1115 charged the employers involved with violations of 8(a)(1) and (5) of the Act, 29 U.S.C. 158(a)(1) and (5), for unilaterally changing the terms and conditions of employment which had been set forth in the negotiated collective bargaining agreements.

There is no dispute that the agreements called for the increases in wages, holiday and sick pay, and that each of the respondent employers has failed to pay said increases to employees when due. It is also clear that there is nothing in the agreements which tie the increases to actions of any other party or increased reimbursement.

The Respondents argue that the Medicaid reimbursement formula now prevents them from paying these increases. They urge that this industry is "different" than other industries which must comply with Federal, State and Local rules and regulations. Yet regulated industries such as utilities, transportation, shipping and manufacturing, etc., negotiate collective bargaining agreements with unions and comply with them.

In this case, the record is abundantly clear that the Medicaid reimbursement rate was discussed and negotiated during bargaining sessions. Ultimately, a wage package was agreed upon without any reimbursement contingency. Alex De Laurentis, Vice President of

Local 1115, and a negotiator for the Union, testified: ^{1/}

"During all negotiations over the last three or four contracts, those types of proposals 2/ are always put on the table."

"We don't know where we are going to get the money, it is the usual cry of the employer and we only have one source of getting the money and all that is part and parcel of continuous negotiations."

". . . that's where we came down to a bottom line that they caucus back and forth and we reduced our demands to the point that this was reached 3/ to be final and finding without any contingencies whatsoever."

This testimony was corroborated by Respondents' witnesses, employers who negotiated with the Union. ^{4/} The Respondents now argue that this reimbursement contingency was part of the Agreement. This position flies in the face of both the Agreements as executed and the negotiations which led up to the execution of the Agreements.

POINT I

THE RESPONDENTS HAVE VIOLATED SECTIONS 8(a)(5) AND (1) OF THE ACT

The NLRB found that the Respondents have unilaterally changed the terms and conditions of employment and have modified

1/ Transcript ("TR") page 50, 51.

2/ Wages contingent on reimbursement.

3/ Wage increases as set forth in the Agreements.

4/ Cutler's testimony - Tr. pages 258, 259, 260, 283, 284, 285, 286.

collective bargaining agreements without compliance with regard to Section 8(d) of the Act. They have bypassed the collective bargaining agent in this unilateral imposition of different wages and benefits than had been negotiated. That Respondents have acted in this manner cannot be denied.

In *Oak Cliff-Golman Baking Co.*, 202 NLRB 614, 207 NLRB 1063, enf. sub nom *NLRB v. Oak Cliff-Golman Baking Co.*, 505 F.2d 1302 (5th Cir. 1974), the Board held that the Respondent unilaterally modified its collective bargaining agreement with the Union within the meaning of Section 8(d) of the Act and thereby violated Section 8(a)(5) and (1) of the Act.

The Respondent in *Oak Cliff-Golman*, *supra*, decided that rather than close its operations and lose good employees, because of a financial crisis, it would remain in operation by reducing the wages and salaries of all employees. The Union refused to agree to the wage cuts.

The Board in this case rejected Respondent's claim that the reduction in wages was at most a breach of contract. The Board stated at page 1064:

"It cannot be gainsaid that an employer's decision in midterm of a contract to pay its employees for the remainder of the contract's terms at wage rates below those provided in the collective-bargaining agreement affects what is perhaps the most important element of the many in the employment relationship which Congress remitted to the mandatory process of collective bargaining under the Act. Because so substantial a portion of the remaining aspects of a bargaining contract are dependent upon the wage rate provision, it seems obvious that a clear repudiation of the contract's wage provision is not just a mere breach of the contract, but amounts

"as a practical matter, to the striking of a death blow to the contract as a whole, and is thus, in reality, a basic repudiation of the bargaining relationship. We believe the jurisdiction granted us under the Act clearly encompasses not only the authority but the obligation to protect the statutory process of collective bargaining against conduct so centrally disruptive to one of its principal functions - the establishment and maintenance of a viable agreement on wages.

* * * * *

"The unambiguous language of Section 8(d) of the Act explicitly: (1) forbade Respondent's midterm modification of the contract's wage provisions without the Union's consent; and (2) granted the Union the privilege it exercised to refuse to grant consent. Nowhere in the statutory terms is any authority granted to us to excuse the commission of the proscribed action because of a showing either that such action was compelled by economic need or that it may have served what may appear to us to be a desirable economic objective."

In *Washington Employer's Inc.*, 200 NLRB 825, 827, the Board found respondents had violated Section 8(a)(5) and (1) of the Act by failing to pay agreed upon contract wages and rejected the respondent's argument that Pay Board regulations were involved. The Board stated:

"We find that by their failure to do so, Respondents violated Section 8(a)(5) and (1) of the Act. We find that when Respondents agreed unconditionally to the 12.5 percent increase, they were on notice that some kind of controls would remain on the economy after the expiration of the wage-price freeze. Moreover, Respondents in fact knew specifically, when they signed the contracts on November 29, 1971, that controls remained. It follows that Respondents were willing to assume the risk of being obliged to pay what might later be excused as an increase in excess of the Pay Board's regulations. Respondents thus cannot now complain of this Board's requiring them to pay what they agreed upon, first during the negotiations, and again after Phase II went into effect."

It is axiomatic that an employer acts in derogation of his bargaining obligation under Section 8(d) and hence violates Section 8(a)(5), when, without the consent of the employees' bargaining repre-

sentative, he modifies terms and conditions of employment contained in a contract, or otherwise repudiates his obligations under the contract, before the term of the contract has expired, even if he previously offers to bargain with the Union on the subject and the Union refuses. See *C & S Industries, Inc.*, 154 NLRB 454; *Washington Refrigeration Service Co.*, 206 NLRB 852; *Nedco Construction Corp.*, 200 NLRB 150; *NLRB v. Huttig Sash & Door Co., Inc.*, 377 F.2d 964 (8th Cir. 1967).

It is quite clear in this case that the Respondents refused to honor the Agreements effective January 1, 1975, by failing to pay contract wages and other benefits during the term of the Agreement and this was a repudiation of the Respondents' obligation to bargain within the meaning of Section 8(d) of the Act. The Board's finding of a violation is clearly supported by the evidence in the record. *Universal Camera v. NLRB*, 340 U.S. 474 (1951).

POINT II

THE APPROPRIATE REMEDY

The Board found that the breach of the collective bargaining agreements in this case went to the very heart of the collective bargaining process. The wage structure set up in the Agreements had not been complied with. Additionally, holiday and sick leave provisions have been violated. The remedy in this case was, among other things, a cease and desist order and an order directing each respondent to reimburse its employees for any loss of earnings they may have sustained by reason of Respondent's failure to honor and abide by the

existing collective bargaining agreements, including failure to pay wage increases provided for therein, together with interest as prescribed in *Isis Plumbing & Heating Co.*, 138 NLRB 716.

The remedies ordered by the Board are needed to effectuate the Act for violations of 8(a)(5) and have long been recognized by the Board and approved by the Courts. See *Leeds & Northrup Co. v. NLRB*, 391 F.2d 894 (3 Cir. 1968), enforcing 162 NLRB No. 87; *NLRB v. Frontier Homes Corp.*, 371 F.2d 974 (8 Cir. 1967), enforcing in part 153 NLRB 1070; *Overnite Transportation Co. v. NLRB*, 372 F.2d 765 (4 Cir. 1967) cert denied 389 U.S. 838, enforcing 157 NLRB No. 103; *George E. Light Boat Storage, Inc.*, 373 F.2d 762 (5 Cir. 1967), enforcing 153 NLRB 1209 (Fn.1) on this issue.

Congress under §10(c) of the Act, 29 USC §160(c), has given the Board a relatively free hand and extremely broad discretion in determining which remedy will best effectuate the purposes of the Act. *Republic Aviation Corp. v. NLRB*, 324 U.S. 793 (1945); *NLRB v. Mine Workers Local 403*, 375 U.S. 396 (1964).

Moreover, under the regulatory scheme of the Act, the Appellate Court function is limited to reviewing questions of law. Thus, the Courts are to defer to the judgment of the Board matters of remedy. *NLRB v. Seven-Up Bottling Co.*, 344 U.S. 344 (1953); *Russell Motors, Inc. v. NLRB*, 481 F.2d 996 (2nd Cir. 1973).

In this case the Board has ordered the proper remedy to effectuate the policies of the Act. The remedial order should be enforced.

CONCLUSION

FOR THE FOREGOING REASONS, THE BOARD'S
DECISION AND REMEDIAL ORDER SHOULD BE
ENFORCED.

Dated: New York, New York
June 13, 1977

Respectfully submitted,

CHARLES R. KATZ
Attorney for Intervenor Local 1115
360 Lexington Avenue
New York, New York 10017

Richard M. Greenspan, Esq.
On the Brief

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Nursing Home and Carrillon House and H.R.F.,

Respondents.

**AFFIDAVIT
OF SERVICE
BY MAIL**

STATE OF NEW YORK,
COUNTY OF NEW YORK, ss.:

Frank DiBenedetto

, being duly sworn, deposes and says that he
is over the age of 18 years, is not a party to the action, and resides
at 40 Bay 37 Street Brooklyn New York
That on June 16, 1977, he served 2 copies of Brief

on National Labor Relations Board
Washington, D.C. 20570
Elliott Moore, Deputy Associate General Counsel
Solomon, Rosenbaum, Goodman, Reier & Ross, Esqs. Regional Director
Att: Irving Reier, Esq.
1450 Broadway
New York, New York 10018
J. Ozias Kaufman, Esq.
103 Cooper Street, P.O. Box 248
Babylon, New York 11702
National Labor Relation
Board- Region 29
16 Court Street
Brooklyn, N.Y. 11241
Samuel M. Kaynard
Jackson, Lewis, Schnitzler &
Krupman, Esqs.
261 Madison Avenue
New York, N.Y. 10016
Hull, Block & Grundfast, Esqs.
8 Manor Road, P.O. Box 623
Smithtown, N.Y. 11787

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City of New York, addressed as above shown.

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16 day of June, 1977

...*Frank DiBenedetto*...

John V. DiBenedetto
JOHN V. DI BENEDETTO
Notary Public, State of New York
No. 30-0632350
Qualified in Nassau County
Commission Expires March 30, 1979